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No. 89-515.

In the

Supreme Court of the United States.

OCTOBER TERM, 1989.

ROCHESTER, NEW HAMPSHIRE, SCHOOL DISTRICT,
PETITIONER,

v.

TIMOTHY W., BY AND THROUGH HIS
MOTHER AND NEXT FRIEND, CYNTHIA W.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION.

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Questions Presented.

I. Whether the plain language contained of the Education for All Handicapped Children Act, 20 U.S.C. §§ 1400 *et seq.*, directing States and local education agencies to provide a free appropriate public education to all handicapped children regardless of the severity of handicap, prohibits excluding a child considered by the education agency to be too severely handicapped to benefit from educational services.

II. Whether under the Education for All Handicapped Children Act the definition of education is broad enough to encompass the provision of services, such as physical and occupational therapy, to profoundly handicapped children.

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Respondent Timothy W. respectfully requests that the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit be denied.

Statement of the Case.

This case involves Timothy W., a thirteen year old child who, in his short life, has been excluded from public education for seven years, has received inadequate education for four years, and whom the Petitioner, Rochester School District, seeks to exclude from education for the rest of his life. The Petitioner contends that the United States Court of Appeals for the First Circuit erred in holding that the plain language of the Education for All Handicapped Children Act (EAHCA), 20 U.S.C. §§ 1400 *et seq.*, its legislative history, and case law prohibit a school district from refusing to provide a handicapped child with a free appropriate public education, including special education and related services, when the school district considers that the child does not have the capacity to benefit from educational services.

Respondent Timothy W. was born on December 8, 1975. He lives in Rochester, New Hampshire with his mother, Cynthia; two brothers (one of whom is severely handicapped); and a sister (App. VI, 1292-1294). He has lived in Rochester all his life.

Timothy has severe physical handicaps and profound mental retardation. Due to complications which arose during his birth, he was hospitalized on several occasions during the first year of his life, and experienced a number of very serious problems, including an intracranial hemorrhage, subdural effusions, seizures, and hydrocephalus. The hydrocephalus was treated with a ventriculoperitoneal shunt to drain fluid from his head (App. III, 464-465).

Despite those devastating conditions, most professionals who have worked with Timothy agree that he has educational needs, and that he can benefit from education. For example, reports of the ABLE and Child Development Center programs indicate that, during his placements there, Timothy demonstrated abilities in several educational areas such as visual, auditory, and tactile development, as well as in the areas of

cognition, communication, and language (App. III, 491-492, 536). Other reports and testimony indicate that Timothy can benefit from an education, but that his educational program and placement must involve persons of various disciplines, must be consistent, and must include, as an integral part of the program, the provision of physical and occupational therapy (App. I, 64-73; App. III, 531-534; *see also* App. III, 568-745). Finally, reports and testimony of experts also identified specific educational needs, and recommended specific educational services and programs for Timothy, the core of which would consist of physical and occupational therapy (*see especially* Report of Morse, App. III, 524, and Affidavit of Schofield (App. VI, 1360-1369).) These reports and testimony indicate that Timothy would benefit from such services and program through increased participation in his daily routine, more control over his body, and increased ability to communicate his wants and needs (*see especially* Report of Kugel, App. III, 540-542, and Cloninger, Edelman, and Iverson, App. III, 555-557); gave examples of other children as severely handicapped as Timothy who routinely receive and benefit from public educational programs (*see especially* Report of Cloninger, Edelman, and Iverson, App. III, 549-553, and Testimony of Riggio, App. I, 70-72); and stressed that without an educational program Timothy's prospects for making any educational progress are nil (Testimony of Schwaninger, App. II, 298-299).

Timothy turned three years old in 1978, which was, coincidentally, the very year by which States, under the EAHCA, had "to insure that a free appropriate public education is available for all handicapped children aged three through eighteen within the State . . ." 20 U.S.C. § 1412(2)(B). The school district was aware of Timothy's needs shortly after he turned three years old (App. V, 1098). Timothy was, however, not provided with any educational services that year, or at any time until May 1985, and only then as a consequence of the filing of this action, and of having been ordered to do so by the

Commissioner of the New Hampshire Department of Education acting on a complaint filed by Timothy's mother[1] (App. IV, 835, 839-847, and 874).

During the seven years between Timothy's identification and the first provision of educational services in 1985, the school district team met four times to consider his entitlement to an education. The first meeting did not occur until February 19, 1980, when Timothy was five. At the following meeting in March 1980, the school district decided that he was not entitled to receive an education.

According to the minutes of the March 1980 meeting, the statements of Kathryn VanZandt, the Director of Pupil Services in Rochester, appear to reflect the prevailing view of the members of the team who decided that Timothy was not educationally handicapped:

> Mrs. VanZandt said she was looking at what we know of education in the traditional sense, and she did not feel that is what Timmy needs; therefore, he

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[1] Petitioner's contention that Timothy received "extensive" services (Petition at 3) from the time he was a year old is not supported by the record. During 1976 and 1977, after his release from the hospital, Timothy was seen, at most, only once a week at the Rochester Well Baby Clinic and the Portsmouth Rehabilitation Center's Preschool and Home Program (App. III, 467; App. IV, 748, 885, 888). From 1977 to 1981, while Timothy did attend the Child Development Center, funded through the Disabled Children's Program of the Social Security Act, 42 U.S.C. § 1382, it appears that he did so no more than three times a week (App. IV, 765-771, 802). Furthermore, Timothy did not even have a service plan until 1980, and even then that service plan bore little resemblance to the Individualized Education Program (IEP) required by the EAHCA; it contained few, if any, of the elements of an IEP required by 34 C.F.R. § 300.346, and it was not developed in accordance with the procedures mandated by 34 C.F.R. §§ 300.344(a)(3) and 300.345, including the requirement of parental participation (App. IV, 798-802). In any case, by mid-1980, Social Security funding for services was discontinued because Timothy became ineligible (App. I, 12-13). After July of 1980, and until he entered the ABLE program in May 1985, Timothy's total program of services consisted of respite care four times per week, physical therapy once every two months, and one home visit every two months (App. I, 38-39; App. IV, 802). In comparison, had he been in a special education program, he would have received, at least, 5¼ hours per day and 180 days per year of education.

> should not be considered handicapped. She continued that she felt he should receive services, but not educational services. Mrs. VanZandt added that she did not feel it was a local district's responsibility for funding; it is a larger issue than that.

(App. IV, 793).[2] As a result of this decision, the school district made no effort to evaluate Timothy or provide him with an educational program in 1981 and 1982.[3]

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[2] To be sure, throughout this case, there has been considerable debate about whether Timothy could benefit from an education. As reflected by Mrs. VanZandt's statement, this debate appears to have turned as much on one's personal philosophy of education as anything else. Thus, in one camp there were those such as Dr. Rozycki, who indicated in a letter that Timothy "has no potential for development of self-care functions and has no educational potential." And in the other camp were persons such as Dr. Mackey, Timothy's treating physician, who on numerous occasions stated his belief that Timothy needed a program of "daily educational therapy," which program included "therapeutic exercise, developmental stimulation, muscle strengthening, range of motion, and developmental activities" and a range of services such as occupational and physical therapy, and tactile stimulation (App. III, 472 and 470; App. IV, 772 and 782-788); Susan Curtis, M.S., who had written a report recommending the establishment of a number of educational goals and objectives for Timothy in order to increase his ability to locate to sound, to teach him appropriate social responses to his name, and to teach him to reach for and interact with objects or toys (App. III, 476-480); Mary Bamford, who recommended a program of positioning and stimulation to enable Timothy to interact with his environment (App. III, 473-475); and Lynn Miller, who described Timothy's needs as including "postural drainage, range of motion, sensory stimulation of all kinds, correct positioning, proper sitting equipment and work with his head control." (App. I, 46-47; App. III, 486-487.)

[3] These actions were taken in contravention of State policy. As pointed out by the New Hampshire Department of Education, in a report issued as a result of a May, 1982 on-site review of the Rochester School District:

> Two years ago, a student was determined not to be capable of benefiting from special education services because of the severity of his handicapping conditions. Even though the State Board of Education has recently taken the general position that districts cannot use "capable of being benefited from (by) instruction" as an appropriate criterion for denying eligibility for special education services, the District has not reviewed this student (approximately age 6) nor has the District provided the parents with the opportunity to exercise their rights of due process.

(App. V, 1081, 1136-1137.)

In January 1984, it appeared, briefly, that the school district was about to reverse its position when the placement team, based upon a report by Lynn Miller, an expert in the field of providing occupational and physical therapy to physically handicapped children in educational programs, identified seven educational needs for Timothy, and recommended placement at the Child Development Center (App. IV, 823). However, the Rochester School Board, at their February 9, 1984 meeting, in essence vetoed the special education program and placement recommended by the team.[4] It did this by tabling the request for funds for this program and placement on the grounds that it needed additional information. (Testimony of Jon Gale, App. I, 147-149; App. IV, 829.)

On November 17, 1984, Timothy W. filed this action contending that the longstanding refusal of the Petitioner to provide him with a free appropriate public education violated the rights guaranteed to him by the EAHCA; corresponding State law, R.S.A. 186-C and its implementing regulations, the New Hampshire Standards, Ed 1101, *et seq.*; § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; and the Fourteenth Amendment to the Constitution of the United States (App. V, 1078-1097). Timothy sought an order requiring the school district to provide him with an education and $175,000 in damages.

After denying Timothy's motion for preliminary injunction and the school district's motion to dismiss (App. V, 1154-1167, 1168-1172), the district court, on May 20, 1987, remanded Timothy's EAHCA claim to the hearing officer of the New Hampshire Department of Education and stayed action on all other claims until the adminstrative proceedings had been exhausted (App. V, 1221-1242).

On October 14, 1987, over Timothy's objection, the hearing officer of the New Hampshire Department of Education granted

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[4] This decision was made despite the clear requirement that placement team decisions be made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. 34 C.F.R. § 300.533(a)(3).

the school district's motion for a ruling on the legal relevance of his capacity to benefit from special education prior to a hearing on the merits (App. VI, 1337-1338). After the submission by the parties of the documentary evidence only, the hearing officer ruled on the basis of the EAHCA and State law that his capacity to benefit was not legally relevant and that he was entitled to receive a free appropriate public education (Pet. App. 62a).

The school district appealed the decision of the hearing officer and moved for summary judgment, requesting that the decision be reversed and that Timothy's EAHCA and State law claims be remanded again for a full evidentiary hearing on whether Timothy could "benefit" from special education (App. V, 1244-1246, 1255-1257). On July 15, 1988, after a two-day expedited hearing on the merits, the court ruled that a capacity to benefit standard could be used to determine Timothy's eligibility for special education and that Timothy was ineligible (Pet. App. 40a).

In reaching its decision, the district court indicated that in its view a handicapped child is not entitled to "attempted education" if that child is found to be "incapable of cognitive learning." (Pet. App. 45a.) The court also placed great weight on the testimony of Dr. Patricia Andrews, the school district's expert, that Timothy needs physical and occupational therapy but "that there is no likelihood that Timothy W. will acquire academic skills or be able to care for himself and does not have communication skills." (Pet. App. 52a.) The court then concluded that Timothy cannot benefit from education and that the "greatest service . . . that society can do for Timothy W. is to alleviate his pain(s) and suffering(s) and provide him with a comfortable and secure living environment." (Pet. App. 57a.)

On appeal, Timothy challenged both the legal and factual conclusions reached by the district court. Although the court of appeals' own analysis of the facts evidenced serious misgivings, if not disagreement, with the district court's factual findings, it found it unecessary to overrule the court on that ground

(Pet. App. 9a). Instead, the court of appeals, after exhaustively reviewing the language of the EAHCA, its legislative history, and the relevant case law, correctly held that there was no requirement under the EAHCA, or the New Hampshire law implementing it, that a handicapped child demonstrate that he can benefit from special education in order to be eligible to receive that education (Pet. App. 38a).

In reaching that decision, the court of appeals was particularly impressed by the fact that the word "all" permeates the EAHCA, that Congress expressly stated that it intended to end the exclusion of handicapped children from education, and that the severely handicapped were given priority under the Act (Pet. App. 10a-11a). The court did not end its analysis there. The court also reviewed the legislative history of the EAHCA as well as post-enactment actions by Congress. As a result, the court concluded that Congress was "unequivocal at the time of passage of the Act in 1975, and it has been equally unequivocal during the intervening years." (Pet. App. 29a.) Finally, the court reviewed the few cases which have even considered the issue. Here again, however, the court found the mandate to be unmistakable; all handicapped children are entitled to a free appropriate public education (Pet. App. 38a-39a).

REASONS FOR DENYING WRIT.

In essence, Petitioner seeks in this case to return to the practice which was widespread prior to the enactment of the EAHCA: the exclusion from public education of some handicapped children who are thought to be too handicapped to benefit from education. Petitioner seeks to achieve this goal in two ways. First, Petitioner seeks to have this Court engraft upon the EAHCA words that appear nowhere in the legislation, words to the effect that a child shall not receive an education unless it can be shown that he or she will benefit from education. Second, Petitioner seeks to construct the definition of

special education in a way which would operate to effectively exclude certain severely handicapped children from receiving the education that most professionals agree can and should be provided.

Certiorari, however, is not warranted in this case. There is no conflict among the courts which have considered the issues raised by this case. In fact, courts have agreed that the EAHCA requires that all handicapped children, regardless of the severity of their handicap, be provided with a free appropriate public education and that, to accomplish that end, education must be defined broadly. No other interpretation is possible. The EAHCA, on its face and through its legislative history, is clear: *all* handicapped children are entitled to receive a free, appropriate public education which will meet their unique needs.

Even if the EAHCA were ambiguous or there were a split among the courts on the issues presented by this case, the issue regarding the scope of services to be provided to Timothy is not ripe. No dispute has arisen over what services he should receive; the dispute has centered on whether he is even eligible to receive services.

Finally, this case does not reach the requisite level of importance to justify certiorari because the issue so rarely arises, and it affects only a few states and a relatively small number of handicapped students.

I. There Are No Conflicts Which Warrant the Granting of the Petition in This Case Since the Court Decision is Consistent with the Decision of Other Appeals Courts, the Plain Language of the EAHCA, Its Legislative History, and the Decisions of This Court.

A. *There is No Conflict Between the Decision of the Court Below and the Decisions of Any Other Federal or State Court of Appeals.*

To warrant full consideration by this Court on a petition for certiorari, Petitioner generally should show that there is a *direct* conflict between the court of appeals' decision and decisions of this Court, the courts of appeal of the other federal circuits or the highest appellate court of the affected state. *See* U.S. Sup. Ct. Rule 17.1(a); Stern and Gressman, *Supreme Court Practice*, 6th Ed., 1978. 196-212.

Notably absent from the Petitioner's arguments in favor of a grant of certiorari, is any assertion that there is a split among the circuits on the issues presented. That is because, as noted by the court of appeals, the decision of the district court is "the only court in the fourteen years subsequent to the passage of the Act, to hold that a handicapped child was not entitled to a public education under the Act because he could not benefit from the education." (Pet. App., 38a). Like the court of appeals in this case, virtually every court, in reviewing the mandate of the EAHCA has recognized that, "[t]he language and the legislative history of the Act simply do not entertain the possibility that some children may be untrainable." *Kruelle* v. *New Castle County School District*, 642 F.2d 687, 695 (3d Cir. 1981). *Accord: Abrahamson* v. *Hershman*, 701 F.2d 223, 228 (1st Cir. 1983) ("Congress established a *priority* under the Act for the most severely retarded children, 20 U.S.C. § 1412(3), for many of whom, certainly, education will not

consist of a classroom training but rather training in very basic skills.") (emphasis added); *Garrity* v. *Gallen*, 522 F.Supp. 171, 217 (D. N.H. 1981) (under EAHCA and Section 504 of the Rehabilitation Act of 1973, a state school "cannot . . . absolutely deny certain services to individuals without providing equivalent services . . . [p]rofoundly retarded resident must be offered [education and training] to the same extent as mildly retarded resident. . . ."); *Gladys J.* v. *Pearland Ind. School District*, 520 F.Supp. 869, 879 (S.D. Tex. 1981) ("The language and the legislative history of [the EAHCA] simply do not admit of the possibility that some children may be beyond the reach of our educational expertise.") *Matthews* v. *Campbell*, 1979-1980 EHLR DEC. 551:264, 266 (E.D. Va. 1979) ("neither the language of the [EAHCA] nor the legislative history appears to contemplate [the] possibility [that a child may be 'untrainable.']."))[5] As the following section shows, courts could not have reached any other conclusion.

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[5] There is one court decision under the EAHCA which suggests, in *dicta*, the possibility of excluding some comatose handicapped children from education. *Parks* v. *Pavkovic*, 753 F.2d. 1397, 1405 (7th Cir. 1985). Aside from the fact that Timothy is not in a coma, the court's discussion of the "hypothetical case" in *Parks* is scant authority indeed for ruling that the EAHCA requires demonstration of capacity to benefit as a precondition to eligibility for special education. The court in *Parks* was not confronted with issues presented here; nor did the court, as in the cases cited above, have the occasion to determine what was appropriate special education in a given case. The *Parks* case was a class action in which the court was confronted with the issue of whether the State of Illinois violated the EAHCA by requiring parents to pay costs related to their children's institutionalization. Furthermore, it is unclear exactly how that court would rule if presented with the issues in this case. As the court stated:

> With persons as severely retarded as Lester Parks the scope for education is extremely limited, but we do not understand the state to be arguing that Lester or the other members of the class are uneducable. Nor would such an argument be likely to succeed (See e.g. *Abrahamson* v. *Hershman, supra*, 701 F.2d at 228); 3-6 year olds are educable. The state might as well have said, we choose to classify as developmentally disabled those children whose only need is for special education.

Parks, 753 F.2d at 1406.

B. *The Decision by the Court of Appeals is Faithful to the Plain Language of the EAHCA and the Mandate of Congress as Expressed in its Legislative History.*

The plain language of the EAHCA is unequivocal in mandating education for all, and the court of appeals correctly interpreted and applied its provisions.[6] In 1975, Congress, in the face of evidence which showed that there were more than eight million handicapped children in the United States whose educational needs were not being met and one million children — usually the most severely handicapped — who were receiving no education at all,[7] enacted legislation to remedy this problem and entitled it "Education for *All* Handicapped Children Act of 1975." Section 1 of Act, Nov. 29, 1975, P.L. 94-142, 89 Stat. 773 (emphasis added). The express purpose of the EAHCA is "to assure that *all* handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(c) (emphasis added). The EAHCA points to the fact that "State and local educational agencies have a responsibility to provide education

[6] The court of appeals also correctly interpreted and applied State law. While federal special education law provides a basic "floor of opportunity," it also incorporates by reference the sometimes more generous state substantive law standards. *David D.* v. *Dartmouth School Committee*, 775 F.2d 411 (1st Cir. 1985). In this case, regardless of whether the EAHCA is absolute in guaranteeing Timothy a free appropriate public education, New Hampshire R.S.A. 186-C is devoid of a "capacity to benefit" standard. As the State hearing officer found, New Hampshire's special education law, R.S.A. 186-A:6, once contained a "capacity of being benefited from instruction" requirement which was repealed in 1978 (Pet. App. 61a). State law now declares that it is the policy "that *all* children in New Hampshire be provided with equal educational opportunities." R.S.A. 186-C:1 (Pet. App. 182a) New Hampshire law, moreover, guarantees to "*all school-age children*" a quality education, "to the end that each such child shall be provided the opportunity to *reach his full educational potential* and shall have been exposed to the widest possible variety of educational and cultural experiences consistent with sound basic education." R.S.A. 21-N:1(II)(c) (emphasis added).

[7] H.R. Rep. No. 332, 44 Cong., 1st Sess. 2 at 7.

for *all* handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children." 20 U.S.C. § 1400(b)(8) (emphasis added). The EAHCA explicitly requires States to assure that a free appropriate public education will be available for "*all* handicapped children" of school age, "regardless of the severity of their handicap." 20 U.S.C. §§ 1412(1) and 1412(2)(C) (emphasis added). Significantly, in response to the widespread exclusion of children with severe handicaps, the EAHCA required that participating states "establish priorities for providing a free appropriate education to all handicapped children . . . first with respect to handicapped children who are not receiving an education, second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education." 20 U.S.C. § 1412(3).[8]

The legislative history of the EAHCA shows as clearly as does the express language of the Act that Congress intended that no handicapped child should be excluded on the basis of ineducability. Throughout the hearings, legislators specifically indicated that exclusion of handicapped children was an evil the legislation was intended to combat. Passage of the EAHCA was the culmination of Congressional efforts since 1966 to

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[8] In an attempt to avoid the implications of the fact that the phrase "capacity to benefit," is not to be found anywhere in the EAHCA, the Petitioner argues that the use of the word "need" in 20 U.S.C. § 1412(2)(C) is functionally equivalent to Congress expressly providing for a "capable of benefiting" eligibility standard in the EAHCA. The problem with this argument as it is posed (i.e. that the State may exclude from education altogether a child who does not need or cannot benefit from education) is that it is irreconcilable with other express provisions within the Act. For example, under 20 U.S.C. § 1412(1) the State must without qualification assure "all handicapped children the right to a free appropriate public education." A more logical way to view the use of the word "need," and one more consistent with language of the statute as a whole and its legislative history, is that the "need" requirement imposes an upper limit on who is eligible for *special* education, since not all handicapped children need *special* education in order to obtain a free appropriate public education. Some handicapped children are able to participate in regular education with their peers without the need for any *special* services.

address the national failure to provide handicapped children "educational opportunity that has been long considered the right of every other American child." 121 Cong. Rec. S 20427 (daily ed. Nov. 19, 1975) (remarks by Sen. Randolph). At hearings held in 1973 and 1974, the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare heard numerous witnesses, including, among others, parents, teachers, and special education professionals, testify that handicapped children were being excluded from school, denied necessary services, and subjected to educational neglect, in many cases because school officials contended they could not learn.[9] As summarized by Senator Williams:

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[9] This type of testimony was prevalent throughout the legislative history of the EAHCA. *See e.g., Extension of Education of the Handicapped Act: Hearings on H.R. 7217 Before the Subcommittee on Select Education of the House of Representatives Committee on Education and Labor*, 94th Cong., 1st Sess. 40 (1975) (statement of Frederick J. Weintraub, Council for Exceptional Children) ("schools were contending that there were very severely handicapped children who 'could not learn, could not benefit from an education.' . . . All children are educable, even the most severely impaired child"); *Financial Assistance for Improved Educational Services for Handicapped Children: Hearings on H.R. 70 Before the Select Subcommittee on Education of the House of Representatives Committee on Education and Labor*, 93d Cong., 2d Sess. 221 (1974) (statement of Samuel Teitelman); *Education for All Handicapped Children, 1975: Hearings on S. 6 Before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare*, 94th Cong., 1st Sess. 227 (1975) (statement of Kate Long, Special Education Professional) ("Since it was generally assumed, with the best of intentions, that these retarded children couldn't learn anyhow, there was great resistance to spending money on the program"); *Education for All Handicapped Children, 1973-1974: Hearings on S. 6 Before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare*, 93d Cong., 1st Sess. 25, 97-98 (1973) (statement of Mildred Ricci) (son classified "ineducable or trainable retarded" and denied public education); *id.* at 99 (child excluded from public school as uneducable); *id.* at 346-347 (statement of David Bartley, Speaker, Massachusetts House of Representatives); *id.* at 394-395 (statement of Barbara Cutler, Past President, Association for Mentally Ill Children in Massachusetts); *id.* at 653-655 (statement of Dr. Dorothy Fleetwood, Director, Habilitation Services, Partlow State School and Hospital); *id.* at 658 (statement of Dr. Oliver L. Hurley, Associate Professor of Special Education, University of Georgia.

> Exclusion from school, institutionalization, the lack of appropriate services to provide attention to the individual child's need — indeed, the denial of equal rights by a society which proclaims liberty and justice for all of its people — are echoes which the subcommittee has found throughout all of its hearings.[10]

Congress also took extensive testimony decrying the lack of programs for severely and profoundly handicapped children and insisting that *all* such children can benefit fr[illegible]ducation.[11]

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[10] *Education for All Handicapped Children, 1973-74: Hearings on S.6 Before the Subcommittee on The Handicapped of the Senate Committee on Labor and Public Welfare*, 93d Cong., 1st Sess. (1973-74) n. 2, at 1153.

[11] *See e.g. Education for All Handicapped Children, 1974: Hearings on S. 6 Before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare*, 93d Cong., 1st Sess. 50 (1973) (statement of Robert Stearns) (legislation must include profoundly retarded because they, too, can benefit from education and have been most neglected); *id.* at 372 (statement of Professor Gunnar Dybwad, Brandeis University) ("It is indeed of the essence that all handicapped children without exception receive a free appropriate public education. Ten years ago such a proposal would have brought about the strongest protest . . . from many other professionals in the field of education, psychology, and child development. The situation today is totally different"); *id.* at 395 (statement of Barbara Cutler, Past President, Association for Mentally Ill Children in Massachusetts) ("Without the emphatic 'all handicapped children' these most seriously disturbed children will still go unserved"); *id.* at 430 (statement of Jean Garvin, Vermont State Director of Special Education); *id.* at 654-655 (statement of Dr. Dorothy Fleetwood Director, Habilitation Services, Partlow State School and Hospital) ("An extremely significant aspect of this bill is reflected in the word 'all.' Even our act 106 in Alabama, with which I am pleased, has an element of exclusion — it authorized services for all except the profoundly retarded. This aspect of Senate Bill 6, recognizes a profound point of education. Education is for all children and for handicapped children. What is taught may vary depending upon needs and capabilities, but all are taught"); *id.* at 1455 (statement of Dennis Haggerty, Esquire) ("That the mere classification of retarded-educable and retarded-trainable with assigned IQ's lead to the premise that all below those designated IQ's were RN — retarded nothing. Rather than the above, the presumption should have been — all persons are capable of some education — a zero reject principle'); *Extension of the Education of the Handicapped Act: Hearings on H.R. 7217 Before the Subcommittee on Select Education of the House of Representatives Committee on Education and Labor*, 94th Cong., 1st Sess., 40 (statement of Frederick J. Weintraub, Council for Exceptional Children) ("All children are educable, even the most severely impaired child"); *Financial Assistance for Improved*

Indeed, there is not a single suggestion in the legislative history that any child should be excluded from the coverage of the EAHCA because that child is too severely handicapped.[12]

As stressed by the court of appeals, in the fourteen years since its enactment, the EAHCA has been amended four times,[13] and each of these amendments confirm that Congress has never wavered in its policy that each and every severely handicapped child be included, that no educability eligibility test be allowed, and that those children who, like Timothy, have the most severe handicaps, receive priority attention (Pet. App. 24a-29a). For example, in its most recent amendment to the EAHCA Congress focused especially on the needs and challenges of those children who are deaf-blind and multiply handicapped like Timothy, retaining and extending provisions for direct specialized, intensive professional and allied services to enable such children to achieve their potential. 14 U.S.C.

Educational Services for Handicapped Children: Hearings on H.R. 70 Before the Select Subcommittee on Education of the House of Representatives Committee on Education and Labor, 93d Cong., 2d Sess. 58 (1974) (statement of Rep. Ogden R. Reid, New York) ("We must commit ourselves to the notion that no child is incapable of being educated").

[12] This is not surprising. As the court noted in *Pennsylvania Assoc. for Retarded Citizens (PARC)* v. *Pennsylvania*, 343 F.Supp. 274 (E.D. Pa. 1971), one of the cases relied upon by Congress in passing the EAHCA:

> Without exception, expert opinion indicates that:
>
> [A]ll mentally retarded persons are capable of benefitting from a program of education and training; that the greatest number of retarded persons, given such education and training, are capable of achieving self-sufficiency and the remaining few, with such education and training are capable of achieving some degree of self-care; that the earlier such education and training begins, the more thoroughly and the more efficiently a mentally retarded person will benefit from it and, whether begun early or not, that a mentally retarded person can benefit at any point in his life and development from a program of education.

PARC, 343 F. Supp. at 296.

[13] Pub. L. 95-561, 92 Stat. 2364 (1978); Pub. L. 98-199, 97 Stat. 1357 (1983); Pub. L. 99-372, 100 Stat. 796 (1986); Pub. L. 99-457, 100 Stat. 1145 (1986).

§ 1422. In reaffirming its commitment, the Senate Committee explained:

> The Committee recognizes deaf-blind children and youth as those who have concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that they cannot be accommodated in special education programs solely for the deaf or blind children. . . . It is well known that the majority of the deaf-blind population is severely and multiply handicapped. Thus, many of these children and youth meet the eligibility requirements of more than one classification of handicapped.
>
> By retaining current law the Committee recognizes the continued need for the resources . . . serving deaf-blind children and youth. As previously noted by this Committee in S. Rep. 98-191, these resources should be made available to certain severely, multiply handicapped children.

S. Rep. No. 99-315, 99th Cong. 2d Sess., at 12-13 (1986).

The basic premise of the Petitioner and the district court below — that "Congress would not legislate futility!" (Pet. App. 47a) — is therefore fundamentally flawed. Congress was not legislating futility, because it determined that all children could benefit from an appropriate education. In light of the fact that medical knowledge in this area is both uncertain and rapidly improving, it is not an exercise in futility for Congress to determine that school districts are obligated to *attempt*, at least, to benefit all its handicapped students. It is quite clear that no one knows with certainty what the result of a program will be for a particular child, and Congress determined that guesswork was not an appropriate exercise for its funding recipients. Accordingly, the statute passed by Congress was

not futile but quite reasonable, and the task of carving out any exceptions to it must be left to Congress.

C. *There is No Conflict Between the Decision Below and the Decisions of This Court Interpreting the Education for All Handicapped Children Act.*

Petitioner has not shown that there is a conflict between the decision below and the decisions of this Court. Petitioner can show no such conflict in this case because the decisions of this Court have repeatedly recognized that Congress' overriding concern in enacting the EAHCA was in ending the exclusion of handicapped children from education.

The court of appeals' opinion that the EAHCA may not be rewritten to exclude certain children from education because they are too severely handicapped (Pet. App. 37a-38a) was required by this Court's recent decision in *Honig* v. *Doe*, 484 U.S. 305 (1988). In *Honig* this Court was asked to consider whether the "stay put" requirement of the EAHCA, which mandates that a handicapped child remain in placement during the pending of an appeal, admits of a "dangerousness" exception. One of the plaintiffs had been expelled from a special education program because he had tried to strangle another student. The student's parents contested their child's expulsion and sought his continued placement in the program during their appeal.

This Court, in considering the rationale underlying the "stay put" provision, found that it was designed, along with several other provisions of the EAHCA, to attack state and local school districts' "exclusionary practices" which were rampant prior to the EAHCA. This Court thus found no justification for reading implied exceptions into the provision. As this Court remarked, "[t]he language of § 1415(e)(3) is unequivocal" (*Honig*, 486 U.S. at 323) and the statute "means what it says." *Id.* at 325. Since the omission of any exceptions was, in this Court's view, intentional, it was "therefore not at liberty to

engraft onto the statute an exception Congress chose not to create." *Id.*

This Court's decision in *Irving Independent School Dist.* v. *Tatro*, 468 U.S. 883 (1984) also compels the conclusion of the court of appeals that all handicapped children are entitled to an education. In holding that clean intermittent catheterization was a related service under the EAHCA, this Court explained:

> As we have stated before, "Congress sought primarily to make public education available to handicapped children" and "to make such access meaningful." *Board of Education of Hendrick Hudson Central School District* v. *Rowley*, 458 U.S. 176 (1982). A service that enables a handicapped child to remain at school during the day is an important means of providing the child with the meaningful access to education that Congress envisioned.

Tatro, 468 U.S. at 891.

Despite *Honig* and *Tatro*, Petitioner suggests in its petition for certiorari (see e.g., Petition at 12-13), that the First Circuit's decision is in conflict with this Court's holding in *Board of Education of Hendrick Hudson Central School District* v. *Rowley*, 458 U.S. 176 (1982). Petitioners are wrong.

In *Rowley*, this Court faced the question of whether the EAHCA required the provision of a sign language interpreter for a deaf child who was receiving other assistance and was progressing easily from grade to grade. This Court stated that:

> Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. . . . We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized

> instruction and related services which are individually designed to provide educational benefit to the handicapped child.

458 U.S. at 200. From this passage, Petitioner reasons that the EAHCA does not require special education where no benefit can be derived.

That deduction, however, cannot be fairly made from the quoted language, which was not written with the current issue in mind. As this Court recognized in *Rowley*, the requirements of the EAHCA were not established in a vacuum. Congress, in enacting the EAHCA, relied in large part on two landmark federal court cases challenging the practice of excluding groups of handicapped children from public education, a practice often justified by the claim of school officials that such children could not benefit from schooling. *Pennsylvania Assoc. for Retarded Citizens (PARC)* v. *Pennsylvania*, 334 F.Supp. 1257 (E.D. Pa. 1971), *aff'd and settlement approved*, 343 F.Supp. 274 (E.D. Pa. 1971), and *Mills* v. *Board of Education*, 348 F.Supp. 366 (D. D.C. 1972). The courts in *PARC* and *Mills* both held that "handicapped children may not be excluded entirely from public education." *Rowley*, 458 U.S. at 199.

Petitioner's deduction is inconsistent with the broader lesson of *Rowley* that school districts must provide access to a free, appropriate education quite irrespective of any particular degree of guaranteed success. There is not the slightest indication in that decision that the "basic floor of opportunity" guaranteed by the EAHCA contains, in the words of the First Circuit, "a trap door for the severely handicapped." (Pet. App. 36a.) As this Court has stated:

> Indeed, Congress expressly "recognize[d] that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome." S. Rep. No. 94-168. . . . Thus, the intent of the Act

> was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.

Rowley, supra at 192.

In sum, the decision of the court of appeals is faithful to the plain language of the EAHCA, is in keeping with the will of Congress as expressed in the legislative history of the Act, and is consistent with the decisions rendered under the Act, including the decisions of this Court. The Petition for Writ of Certiorari should, therefore, be denied.

II. THE PETITION, INSOFAR AS IT SEEKS REVIEW OF THE FIRST CIRCUIT'S OPINION THAT EDUCATION UNDER THE EAHCA IS BROADLY DEFINED TO INCLUDE THE PROVISION OF SUCH SERVICES AS PHYSICAL AND OCCUPATIONAL THERAPY TO PROFOUNDLY HANDICAPPED CHILDREN, SHOULD BE DENIED.

A. *The Issue of Whether Education Under the EAHCA is Broadly Defined to Include the Provision of Such Services as Physical and Occupational Therapy to Profoundly Handicapped Children is Not Ripe.*

The court of appeals, in its decision holding that all handicapped children are entitled to an education, pointed out that case law under the EAHCA overwhelmingly supports the view that education is broadly defined, and that the district court's focus on "traditional 'cognitive skills' " obviously led it astray (Pet. App. 33a-34a). Petitioner, in an effort to bolster its case that its petition should be granted, contends that the decision of the court of appeals erroneously "enlarged the scope of services that must be provided [under the EAHCA]." (Petition

at 16.) It is clear, however, that review of this aspect of the First Circuit's decision is not warranted.

First and foremost, review is not warranted because the issue as defined by the Petitioner is not ripe. Neither the district court nor the court of appeals held that the *only* services Timothy needs are services such as physical and occupational therapy. To the contrary, the court of appeals remanded the case, and ordered that the district court retain jurisdiction until a suitable Individualized Education Program (I.E.P.) is effectuated by the school district (Pet. App. 39a). The EAHCA requires that I.E.P.'s be developed at meetings with the participation of the child's parents. 34 C.F.R. § 300.344. A parent may request a hearing if dissatisfied with the I.E.P. 20 U.S.C. § 1416(b)(2).

The evidence suggests, moreover, that Timothy's program should not be limited to the provision of occupational and physical therapy. For example, Dr. William Schofield testified at the preliminary injunction hearing that Timothy needs such services as "occupational therapy, development of some kind of communication program, toileting program, certainly a feeding program, tactile stimulation, which may be the basis for that communication process over the long run." (App. I, 77.) Dr. Schofield's opinion was supported by Kathy Schwaninger who later reported that she viewed Timothy's special education needs as training to accomplish functional and practical skills development, and that such a program must be supported with related services of physical, occupational, and speech therapy (App. III, 747).

The need to integrate all aspects of Timothy's program was also stressed by a number of witnesses. For example, as Dr. Schofield stated:

> The present transdisciplinary educational model utilizes therapists as trainers and evaluators of teacher implemented therapy programs. In this role the therapist trains classroom teachers and aides and parents to utilize therapeutic techniques within the entire

> spectrum of instructional services. Thus the student benefits from correct and appropriate positioning and handling through the day. This means that something as seemingly simple as moving from one place in the classroom to another can become a major part of the educational program for a student with severe motor problems. It is imperative to emphasize that such therapy has a genuine instructional role. What can be learned from these seemingly innocuous exercises is: body control, self expression, self determination, directionality, ambulation, spatial concepts as well as the obvious physical, muscular benefit derived.

(App. VI, 1360-1369.)

This approach to services for severely and profoundly handicapped children is entirely consistent with case law under the EAHCA. Thus, as stated by the court in *Polk* v. *Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 181 (3d Cir. 1988), related services for severely and profoundly handicapped persons serve a dual function.

> First, because these children have extensive physical difficulties that often interfere with development in other areas, physical therapy is an essential prerequisite to education. For example, development of motor abilities is often the first step in overall educational development. *See* P.H. Pearson & C.E. Williams, eds., Physical Therapy Services in the Developmental Disabilities 173 . . . (noting close relationship between speech and head, trunk, and arm control).
>
> Second, the physical therapy itself may form the core of a severely disabled child's special education. This court has recognized that "[t]he educational program of a handicapped child, particularly a severely and profoundly handicapped child . . . is very differ-

> ent from that of a non-handicapped child. The program may consist largely of 'related services' such as physical, occupational, or speech therapy" *DeLeon* v. *Susquehanna Community School Dist.*, 747 F.2d 149, 153 (3d Cir. 1984). In Christopher's case, physical therapy is not merely a conduit to his education but constitutes, in and of itself, a major portion of his special education, teaching him basic skills such as toileting, feeding, ambulation, etc.

This is, therefore, not a case like *Rowley* and *Tatro* where the lines were clearly drawn over what services should be provided. Indeed, the issue for Timothy for the last eleven years has not been whether Timothy should receive this or that service, or how much of this or that service he should receive, but whether he should receive *any* services at all from the school district. In short, until the school district has had an opportunity to comply with the First Circuit's order, and convene the meetings to develop an I.E.P. as required by 34 C.F.R. §§ 300.341-300.346, it is impossible to say whether the language of the court's decision regarding the breadth of services under the EAHCA will create a controversy in this case.

B. *Under the EAHCA Education is Broadly Defined to Include the Provision of Such Services as Physical and Occupational Therapy to Profoundly Handicapped Children.*

In any case, should this Court reach this issue, there is nothing in the EAHCA which requires "related services" and "special education" to be treated as "separate and distinct" categories of service in every instance as claimed by Petitioner. Petition at 16. Although a number of services are specifically listed, including physical and occupational therapy, and are labelled as "related services," the comments to the regulations make it clear that the list "is not exhaustive and may include

other developmental, corrective, or supportive services . . . if they are required to assist a handicapped child to benefit from special education. Comment to 34 C.F.R. § 300.13. The statute and regulations also provide that "the term [special education] includes speech pathology, *or any other related service*, if the service consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child, and is considered 'special education' rather than a 'related service' under State standards." 34 C.F.R. § 300.14(a)(2) (emphasis added). Under New Hampshire regulations a service is "special education" if it is "team designed instruction," meets "the unique needs of an educationally handicapped child," and is based on the "Individualized Education Program." New Hampshire Standards Ed. 1101.24

Given the wide variety of children served by the EAHCA, and the fact that services must be designed to meet the unique needs of the handicapped child, it is not surprising that the EAHCA takes a flexible approach. As this Court pointed out in *Rowley*:

> The Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.

Rowley, 458 U.S. at 202.

As illustrated by Timothy's more than ten year struggle to receive a free appropriate public education, the rigid distinction between special education and related services suggested by Petitioner would, contrary to the express purpose of the EAHCA, effectively foreclose education to many profoundly handicapped children. Profoundly retarded individuals have been defined:

> as those persons who function at the extreme lower levels of cognitive attainment and adaptive behavior and who exhibit at least several of the following primary characteristics:
>
> 1. They have not acquired basic self-care skills.
> 2. They are permanently non-ambulatory.
> 3. They are not known to many of the normal residents of their communities.
> 4. They do not attend public schools unless the law explicitly requires their enrollment.
> 5. They would have survived only a short time a few generations ago but now have a life expectancy of decades due to modern medical intervention.
> 6. They have been considered to be "untrainable" or "custodial" cases until recently.
> 7. They show extremely little promise of becoming creative, productive citizens even with the most heroic efforts of today's most skilled behavior therapists.

Educational Rights of Severely and Profoundly Handicapped Children, 61 Neb. L. Rev. 586, 587 (1982) citing *Symposium on Educating the Severely and Profoundly Handicapped, 1, Analysis and Intervention in Developmental Disabilities*.

In other words, the "cognitive ability" of profoundly retarded children is open to serious question, and their ability to acquire academic skills or be able to care for themselves is often non-existent. It is also more common than not that a profoundly

retarded child is unable to communicate. These facts regarding profoundly retarded children like Timothy should not serve, however, to exclude them from education under the EAHCA.

This point was driven home in *Battle* v. *Armstrong*, 629 F.2d 269 (3d Cir. 1980) *cert. denied* 452 U.S. 968 (1981). In that case, the Third Circuit affirmed a district court decision striking down a Pennsylvania policy of limiting the provision of education to severely and profoundly handicapped students to a period of 180 days. In reaching its decision the court discussed the requirement that special education meet the unique needs of severely handicapped children:

> The statutory goal to provide a "free appropriate education" must be viewed as one establishing the direction toward which the programs required by the statute should aim. To define that direction for the handicapped as one leading toward self-sufficiency is merely to acknowledge the obvious — that the severely and profoundly handicapped children in the plaintiff class do not possess substantial learning capacity along objective academic lines and therefore must be assisted in achieving the realistic educational objective available to them, that of reasonable self-sufficiency under their individual circumstances.

Battle, 629 F.2d at 286.

Finally, it must be stressed that Petitioner has not pointed to any decision which has rejected the approach taken by the court of appeals in this case, or the other courts cited in the court's opinion (Pet. App. 33a-34a), regarding the scope of education available under the EAHCA for severely and profoundly handicapped children. Additionally, Petitioner has not pointed to any authority which supports the view that this Court's intervention is required to relieve the alleged "pressure on school districts to cover the costs of all services needed by a handicapped child. . . ." (Petition at 18). All of the decisions

cited by Petitioner to demonstrate this point merely suggest that disputes in individual cases about whether a particular service is a related service covered by the EAHCA are inevitable when the statute in question guarantees the service when "appropriate". *See Rowley*, 458 U.S. at 195.

III. The Question Presented Does Not Warrant a Grant of Certiorari Because of the Limited Importance of the Issue.

The grant of a writ of certiorari is purely discretionary, *Hicks* v. *Miranda*, 422 U.S. 332, 344 (1975), and is only granted when important issues of federal law are presented which warrant resolution by this Court. Rule 17, U.S. Sup. Ct. Rules. See *U.S.* v. *Oregon*, 366 U.S. 643, 645 (1961); *Commonwealth of Pennsylvania* v. *Nelson*, 350 U.S. 497, 499 (1956); *Rice* v. *Sioux City Memorial Parks Cemetery*, 349 U.S. 70 (1955). The issues presented by Petitioner do not rise to the requisite level of importance because of the limited impact of this issue on States and school districts around the country and the small numbers of handicapped children affected.

A. *The Decision Below Affects Only a Few States and School Districts.*

Contrary to the claim by Petitioner the issue of excluding severely handicapped children from education is not a recurring one. In the fourteen years since the enactment of the EAHCA there has been very little litigation over the issue of whether certain profoundly handicapped students should be excluded from education. There are no other federal or state court decisions on this issue. Furthermore, in reviewing the hundreds of reported administrative decisions over those years, this issue has arisen in

only seven states, with hearing officers in four of those states deciding that the word "All" in the EAHCA means what it says.[14]

There is good reason for this. As the testimony before Congress indicated great strides have been made in educating profoundly retarded individuals and further strides can be expected. *Supra* at n.14. Most states and school districts, therefore, as a matter of both morality and sound educational policy, have assumed the responsibility of educating all handicapped children.[15]

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[14] There have been only a total of eleven reported administrative decisions, including the decision in this case, dealing directly with the issue of exclusion based upon ineducability in the 14 years since the enactment of the EAHCA; four of those cases were in New Hampshire. *See Christopher C.* v. *Weston Pub. Schools*, 1987-88 EHLR 509:154; *Nashua School District* v. *James O.*, (N.H. 1986) (App. VII, 1472); *contra Costa County Consortium*, (Case No. SE-85401), 1985-86 EHLR 507:330 (Cal. 1985); *Case No. SE 53-81*, EHLR 506:239 (Ill. 1984); *School District of the Menomonie Area* v. *Rachel W.*, 1983-84 EHLR 505:220 (1983); *In re Keith J.*, 3 EHLR 502:271 (Ga. 1981); *Case No. 10571*, EHLR 502.315 (N.Y. 1981); *X* v. *Laconia School District* (N.H. 1981) App. VII, 1473); and *Christine L.* v. *Milan School District* (N.H. 1981) (App. VII, 1480) rev'd. by State Bd. of Ed.(1982) (App. VII, 1496). Petitioner's characterization of those administrative decisions ruling in favor of exclusion as expressing the "majority view" (Petition at 8-9 n.8) is puzzling, at best. Petitioner fails to mention that one of those decisions, *Christine L.* v. *Milan School District*, was reversed by the New Hampshire Board of Education on the grounds that an "ability to benefit" provision in state law had been repealed, and that Christine L. was "a citizen of the state, of school age, and handicapped to such an extent that her handicapping conditions interfere with her ability to learn." (App. VII, 1499.) Petitioner also fails to mention that the hearing officer in all the New Hampshire cases, except this one, was the same person.

[15] Petitioner has raised the specter of enormous costs being imposed upon school districts and States. This assertion, as it applies to this case, is speculative. Timothy has never requested expensive services; he has only tried to get in the school house door and receive a special education program. In fact, while it is true that Timothy is placed in a program which costs about $15,000 a year (App. IV, 1066-1067), that is only by default. The school district never offered or made available anything else (App. IV, 1046-1050; App. VI, 1288-1289).

B. *The Decision Below Affects Only a Few Students.*

Because the district court's decision was so imprecise, it is impossible to say with any certainty how many handicapped students would have been affected had it not been reversed. Assuming, however, that only profoundly handicapped students would be susceptible to the standard articulated by that court, it is still clear that there are relatively few children involved, and only then if other states choose to follow the exclusionary practices of some New Hampshire school districts. According to the *Diagnostic and Statistical Manual of Mental Disorders*, Third Edition (DSM-III), published by the American Psychiatric Association, only 1% of the population are mentally retarded, and of the mentally retarded, only 1% are profoundly mentally retarded (App. VII, 1385-1386). According to Petitioner, moreover, only about three or four thousand children are involved. Petition at 9 n.9.

Of course, from Timothy's point of view, if only one profoundly handicapped child were excluded from education, that would be too many. From a national perspective, however, the fact a few school districts around the country may have to serve some children they would rather not serve is not of sufficient importance to warrant the granting of the petition in this case.

Conclusion.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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